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AUTHOR	Oldaker, Lawrence Lee
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ABSTRACT

This paper looks at the meaning of academic freedom and threats to that freedom in recent conflicts and legal rulings. The introduction calls academic freedom confusing and widely misunderstood and offers an historical and legal explanation of the concept as well as discussion of the traditional areas of conflict in instruction, research, promotion and tenure, and expression. A second section reviews how state and federal courts have traditionally proceeded and ruled in cases involving academic freedom. A third section looks at threats to academic freedom by an analysis of changes in higher education and society at large, the impact of the American Association of University Professors 1940 guidelines, and three recent rulings on the freedom of expression rights of high school and college students. The paper concludes that court decisions are weighted in favor of the institutions' academic freedom and that most of the educational decisions have been unfavorable to petitioning professors and students. Courts refrain from overseeing university operations by applying judicial abstention and forum analysis to champion the university's rational and bias-free decisions within its mission. It notes the misconception on the part of faculty members and students about the perceived shelters of common law academic freedom and First Amendment rights. Contains over 90 references. (JB)

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THREATS TO ACADEMIC FREEDOM IN HIGHER EDUCATION

By

LAWRENCE LEE OLDAKER*

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I. INTRODUCTION

Academic freedom may be one of the most widely misunderstood concepts in American education, especially in higher education. This is due, in part, to fundamentally differing perspectives among university administrators, professors, and students. It becomes keenly problematic when each campus interest claims protection under the same doctrine. Their individual perceptions of academic freedom appear to be traced to a tangle of historical, educational, and legal sources, none of which alone presents a clear, precise, and workable guide to effectively address troubling issues.

Historically, the medieval university values of *lehrfreiheit*, the freedom to teach, and *lernfreiheit*, the independence of students to learn,[1] evolved into the traditions found in our public and private colleges and universities. To assist teachers and learners in their quest for true scholarship, a coalition of professional educators lead

[1] Harry T. Edwards and Virginia Davis Nordin, HIGHER EDUCATION & THE LAW 167-70 (Harvard Institute for Educational Management 1979) and William W. Van Alstyne, *Academic Freedom and The First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 Law & Contemporary Problems 79, 82 (Summer 1990).

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by the American Association of University Professors (AAUP), proposed standards of academic freedom nearly eighty years ago.[2] Since then, many higher education policy makers, administrators, and faculties have incorporated AAUP standards for governing academic programs into their institutional bylaws, thereby creating a legal compact to guide employment practices related to professorial duties. In spite of this spread in enumerated academic rights, campus disputes increased. The growing wave of legal conflicts since 1960 [3] highlights the lingering, unclear parameters defining administrator-professor relationships.

Although the creation of suitable intellectual shelters for teachers and learners appears to be championed by university management and labor alike, new and serious tensions continue to surface in everyday campus life. University tribunals and civil courts have been asked to apply a variety of legal standards in settling these disputes. Courts demonstrated an interest in hearing academic rights issues in the free speech and loyalty oath challenges during the Joseph McCarthy anti-communist crusades at the middle of the century.[4] This judicial activism was seen as a part of the federal court's new willingness to "incorporate" Bill of Rights protection to safeguard individuals against impermissible state regulations.[5]

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[2] Edwards and Nordin at 218-24.

[3] Thomas H. Wright, *Faculty and the Law Explosion: Assessing the Impact--A Twenty-five Year Perspective (1960-85) for College and University Lawyers*, 12 J. of Col. & Univ. Law 363 (Winter 1985).

[4] Linda S. Lovely, *Beyond 'The Freedom to Do Good and Not to Teach Evil': Professors' Academic Freedom Rights in Classrooms of Public Higher Education*, 26 Wake Forest L. Rev. 711, 715-21 (1991).

[5] Gitlow v. New York, 268 U.S. 652 (1925). Cited in Todd Brewster, *First &*

Within the past three decades, the U. S. Constitution's First Amendment[6] had been sought by instructors and students in search of protection from perceived institutional violations of academic freedom. Although the federal courts occasionally demonstrated a willingness to apply the Bill of Rights in reviewing challenged state policies, the jurists tended to refrain from making professional decisions in matters affecting university governance, placing the responsibility of operating higher education programs within the province of those best qualified to maintain reasoned institutional needs, the administrators. Federal courts have respected the professional autonomy of universities over aggrieved professors[7] and students[8] by applying judicial abstention,[9] by limiting the scope of constitutionally-protected expression,[10] and by strengthening administrative power to control instruction and to set the tenor of

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Foremost, LIFE Bicentennial Issue on the Bill of Rights, 61 (Fall 1991). For further information, see Melvin I. Urofsky, A MARCH OF LIBERTY, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 642 (Knopf 1988).

[6] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievance." (U.S. Const. art I). The wording of the First Amendment places constraints only on the conduct of the federal government, not that of private individuals or entities. The amendment's reach now extends to state governments because of its incorporation in the Fourteenth Amendment due process clause. For additional information on doctrinal issues of protected free speech, see Nancy J. Meyers, *Free Speech for College Students: How Much is Enough?* 13 J. of Communications & Law 69, 70-80 (March 1991).

[7] Perry A. Zirkel, *Academic Freedom of Individual Faculty Members*, 47 Ed.Law Rep. 824-25 (September 15, 1988).

[8] Meyer at 72.

[9] Terrence Leas, *Higher Education, the Courts, and the "Doctrine" of Academic Abstention*, 20 J. of Law & Ed. 135 (Spring 1991).

[10] Gail Paulus Sorenson, *The Public Forum Doctrine and Its Application in School and College Cases*, 20 J. of Law & Ed. 445-471 (Fall 1991).

preferred behavior.[11]

Since 1973, the AAUP has sought to strengthen faculty governance by urging members to work for the adoption of collective bargaining regulations.[12] The association envisioned the use of labor relation measures as a positive means of providing an effective voice for professors. Ideally, a faculty could thereby extend their competencies in a suitable forum to settle grievances, to insure collegial participation in setting standards of employment, and to further academic freedom and tenure. After decades of promoting collective bargaining by the AAUP, it seems as if the increased unionization of professors has added to the volume of litigation, increased further diversity on campus, and highlighted differences between administrators and instructors.

A. Academic Freedom, a Venerable and Confusing Concept

Colleges and universities in America at the turn of the century were relatively quiet, self-governing academic enclaves. Classroom instruction and research leading to publication or recognition were matters of concern only to those on campus. Few academicians spoke publicly on matters other than education. Venerable institutes of higher learning in this country were accustomed to infrequent change in customs and to minimal attention from the public, with the

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[11] Ann M. Gill, *In the Wake of Fraser and Hazelwood*, 20 J. of Law & Ed. 253-269 (Summer 1991).
[12] *AAUP Statement on Collective Bargaining*, 69 Academe 14a (September-October 1983).

exceptions of an occasional student prank and the loyal weekend devotion of alumni following the non-subsidized athletics of their college. Slowly, the colleges and universities grew in size, academic mission, and social diversity. The mid-century McCarthy-era search for socialists in positions of influence pared back shielding ivy covers to expose the personal character of many lesser known professors. The congressionally-spawned ideological questions raised serious First and Fifth Amendment issues related to free speech, freedom of association, due process, and self-incrimination. These constitutional principles, when applied to university teachers, created a climate of resentment in the academy and helped fashion an emerging concepts of academic freedom as a doctrine to provide legal protection for those engaged in scholarship.[13]

The Supreme Court was direct in affording protection for a professor dismissed for refusing to answer questions concerning political party affiliations. In reversing a state supreme court decision, the high tribunal held that the professor's rights to lecture and to associate with others were constitutionally protected by the due process clause of the fourteenth amendment. Referring to the essential freedom to be enjoyed in the academic community, the court said:

> No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. . . .

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[13] For early mention of academic freedom, see the dissenting opinion by Justice Douglas in Adler v. Bd. of Educ., 342 U.S. 485, 508 (1952); Wieman v. Updegraff, 344 U.S. 183 (1952); Keyishian v. Regents, 385 U.S. 589 (1971); and Healy v. James, 408 U.S. 169 (1972).

> Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always be free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[14]

Once academic freedom gained recognition in the nation's courts, the concept was cited by administrative officials, professors, and students attempting to seek judicial support for their cause, often against other members within the campus community. State colleges and universities were no longer "immune from the sweep of the first amendment" of the U. S. Constitution.[15]

B. Traditional Areas of Conflict in Academe

A common theme of grievance in higher education matters implicated perceived abridgment of first amendment rights. Academic quarrels reached into the primary areas of life on a university campus: classroom instruction, research and publication, expression of beliefs, and promotion and tenure. Confusion ensued when academic freedom was used to denote the freedom of academy administrators as well as professors. These two notions of rights continued to be a source of contradiction and conflict.[16]

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[14] Sweezy v. New Hampshire, 354 U.S. 234, 249-50 (1957).
[15] Healy at 180.
[16] Piarowski v. Ill. Comm. Col. Dist. 759 F.2d 625, 629 (7th Cir. 1985).

1. Instruction

The legal protection envisioned for professors in a marketplace of ideas never afforded unregulated academic freedom. First amendment standards never intended that nontenured professors be made a sovereigns to themselves and therefore immune from university supervision.[17] Although one dean's directive forcing a junior lecturer to change students' grades was viewed as an academic violation,[18] the administration was upheld in discharging the same instructional employee for other factors not forbidden by law.[19]

The Fifth Circuit upheld the discharge of a Texas lecturer for using profane speech in the classroom. The court reasoned that a college teacher was no less accountable to the professional treatment of students "than that of a courtroom lawyer or a member of Congress" in their setting.[20]

The academic judgment of the university was supported throughout a student's challenging dismissal from a pre-medical school program.[21] In affirming the University of Michigan decision to suspend the student, the Supreme Court deferred to the institution's reasonable academic decision making process and dismissed the student's alleged deprivation of property.[22] This action mirrored the

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[17] Lovelace v. Southeastern Mass. Univ., 793 F.2d 419, 426 (1986).
[18] Parate v. Isibor, 868 F.2d 821, 829 (6th Cir. 1989).
[19] Id. at 833.
[20] Martin v. Parrish, 805 F.2d 583, 586 (5th Cir., 1986).
[21] Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).
[22] Id. at 222-3.

Horowitz judgment supporting the non-retention of a medical student for failing to meet academic standards.[23] In the later case, the student was unsuccessful in claiming a deprived liberty interest.[24]

A sociology professor in New York City was threatened by the administrative creation of a "shadow class" to encourage students to avoid exposure to his controversial racial theories.[25] The confrontation between professor and university president escalated to the courts for resolve. The president's remarks that described the difficulty in removing a professor from class for expressing such indecent utterances provided a chilling effect on the professor's First Amendment rights.[26] The instructor prevailed on the issue and won appellate court costs.[27]

Much ado was made of the turmoils related to the developmental studies instructor who was demoted and then dismissed by the University of Georgia.[28] The professor's troubles began when she questioned the promotion of nine scholarship athletes from the tutorial-enrichment program to the regular university curriculum, a move assuring the eligibility of the group for a post-season Sugar Bowl appearance by the university. A federal district court decided

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[23] Univ. of Missouri v. Horowitz, 435 U.S. 78 (1977).
[24] Id. at 82.
[25] Levin v. Harleston, 966 F2d 85 (2nd Cir 1992).
[26] Id. at 89.
[27] Id. at 91.
[28] Jerome W. D. Stokes, *The Jan Kemp Case: No Penalty For Pass Interference*, 16 J. of Law & Ed. 257 (Summer 1987).

that the professional criticism of the academic treatment benefitting the athletes rose to a matter of public concern. The federal tribunal awarded the instructor reemployment rights and a substantial monetary award of $400,000.00. The financial settlement was levied against two university supervisors and not the state institution, in keeping with a judicial interpretation of the Eleventh Amendment.[29]

2. Research

Once the modern university focused on providing instructional services to a greater array of students, the need to expand the institute's scholarly inquiry and publication activities increased as well. No longer were institutions of higher education able to contend with traditional sources to finance a rapidly-growing organization. Intramural research plans were altered to reward the aggressive pursuit of research projects financed by private industry and federal government grants. Contractual relations in research increased on many campuses. With highly competitive external contracts being sought, professors--with administrative approval--were eager to accept lucrative awards for academic research.

Some funding sources for research often placed restrictions on

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[29] Kemp v. Erwin, 651 F.Supp. 495 (1986). For an analysis of the Eleventh Amendment as it is applied to schools and universities, see Lawrence Lee Oldaker and David L. Dagley, *The Eleventh Amendment, Its History and Application to Schools and Universities*, 72 Ed.Law Rep. 479 (April 9, 1992); 1 Ed.Law Q. 169 (1992). An analysis of consistencies in Eleventh Amendment law decisions is presented in David L. Dagley and Lawrence Lee Oldaker, *Are School Districts State Actors (Alter Egos)?* 79 Ed.Law Rep. 367 (February 25, 1993); 2 Ed.Law Q. 304 (1993).

disseminating information from the grant without prior approval. Such was the case in a contested research contract matter in California. Stanford University initiated a successful lawsuit[30] in 1990 to overturn a "gag" rule that prevented research professors from releasing information related to their research. As a result of the contested action by Stanford, the (federal) Department of Health and Social Services was enjoined from requiring prior approval of proposed publications and making such a clause a condition of receiving a research grant. The confidentiality clause in dispute required researchers to give the federal funding source advance notice of their intent to publish preliminary findings, and it allowed governmental contracting officers the right to block such publications.[31] Citing prior rulings, the district court reaffirmed that universities are traditional spheres of free expression so fundamental to the functioning of our society that the ability to control speech within research efforts by means of contract conditions is restricted by the vagueness and overbreadth doctrine of the First Amendment.[32]

3. Promotion and Tenure

Scarcely no two features of life of campus remain closer to the hearts and minds of professors than the collegial practices of naming of those to be favored by promotion in academic rank and choosing

[30] Stanford v. Sullivan, 773 F.Supp. 472 (1991); Stephen Burd, *U.S. Cannot Require Preview of Research*, 38 Chronicle of Higher Education, A1, 34 (October 9, 1991).
[31] Stanford at 474.
[32] Id. at 476-7.

those to be rewarded by tenure. To the extent that university administrators enjoy a comfortable degree of discretion in seeking program efficiencies, junior instructors lacking tenure have little recourse in preventing severance from employment, especially those outspoken ones who may be judged to disrupt departmental stability.[33]

When senior lecturers apply for tenure, they find that professorial peer evaluation committees play crucial roles in deciding who receives the rewards of the academy, the prestige of higher rank and salary, or the enjoyment of continued employment and protection from dismissal without cause. Institutions had, by custom, protected the anonymity of those making promotion and tenure recommendations on a candidate's teaching, research, and public service. Since decisions of this nature were highly subjective, to maintain a degree of effectiveness and to protect individuals serving on panels, universities kept the committee deliberations confidential and beyond the scrutiny of promotion and tenure candidates.[34]

Recently, the pride afforded universities as "impartial bastions of learning"[35] was disrupted in favor of a professor denied tenure by such a peer review panel. An aggrieved female, Chinese-American

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[33] Albert C. Jurenas and Chunsheng Zhang, *Biting The Hands That Feed Them: Can Faculty in Public Colleges and Universities Criticize Their Employers--And Survive?* 63 Ed.Law Rep. 429, 439-40 (December 20, 1990).

[34] Kimberly S. Paul, *In Pursuit of Academic Freedom: The Peer Evaluation Process*, 28 Santa Clara L. Rev. 441, 442 (1988), citing McKillop v. Regents of Pittsburgh, 435 F.Supp. 1328 (W.D. Pa.1977).

[35] Darlene Ricker, *Tenure Under Review: What does 'academic freedom' cover?* 19 Student Lawyer 18-23 (April 1991).

professor at the University of Pennsylvania[36] sought protection from the adverse decision of a peer committee by claiming sexual, racial, and national discrimination under Title VII of the Civil Rights Act of 1964.[37] In the challenge, the federal Equal Employment Opportunity Commission (EEOC) pressed for the tenure files of petitioner-professor Tung and five male professorial peers suspected of receiving more favorable treatment by the university committee.[38] A unanimous Supreme Court rejected the common law claims of academic freedom by the university and applied federal civil rights laws to tenure decisions in institutions of higher education.[39] Courts now appear to be consistent in allowing access to peer review materials in cases alleging discrimination.[40]

Should this EEOC ruling be applied to promotion decisions in the future, universities may no longer have certain advantages over other employers regulating conditions of work in their marketplaces. Yet, colleges and universities continue to differ from other public and private enterprises when the issue protecting tenured employees arises. In some higher institutes, tenure creates a material barrier to administrators attempting to carry out their missions with efficiency. In this instance, some aging, tenured, and unproductive professor may have the security of life employment. To provide a contrast,

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[36] Univ. of Pennsylvania v. EEOC, 110 S.Ct. 577 (1990).
[37] 42 U.S. Code section 2000e-2(a) (1982).
[38] Pennsylvania at 580.
[39] David McMillin, *U. of Penna v. EEOC and Dixon v. Rutgers: Two Supreme Courts Speak on the Academic Freedom Privilege*, 42 Rutgers L. Rev. 1089, 1090 (1990).
[40] Robert M. Hendrickson, THE COLLEGES, THEIR CONSTITUENCIES AND THE COURTS 35 (NOLPE Monograph 1991).

other academies view tenure more flexibly and allow deans and directors to expect veteran professors to be of continuing professional value. In the later case, administrators are more prone to effect post-tenure regulations[41] and to explore staffing options within their mission statement without undue restrictions of tenure regulations.

The extension of the Age Discrimination in Employment Act of 1968 (ADEA)[42] to colleges and universities on January 1, 1994, may force administrators to face the "uncapped" retirement plans of senior professors to the age of seventy and beyond. This federal statute may prompt higher education policy makers to adopt procedures permitting the removal of tenured faculty.[43] Hopefully, the termination of senior faculty members would occur only for just cause since academic tenure has proven to provide a good foundation and a secure job for so many highly valued and productive university professors.[44]

4. Expression

Clearly, the most hotly contested feature of academic freedom

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[41] Christine M. Licata, POST-TENURE FACULTY EVALUATION: THREAT OR OPPORTUNITY? (ASHE-ERIC 1986).

[42] 29 U.S. Code Secs. 621-34.

[43] William G. Hollingsworth, *Controlling Post-Tenure Scholarship*, 41 J. of Legal Ed. 141 (June 1991).

[44] For an excellent analysis of the ADEA and its implications for higher education, see Arval A. Morris, DISMISSAL OF TENURED HIGHER EDUCATION FACULTY: LEGAL IMPLICATIONS OF THE ELIMINATION OF MANDATORY RETIREMENT (NOLPE Monograph 1992).

issues is related to expressing professional or personal values in speech or in non-verbal display. When authorities feel compelled to curb questionable behavior, often in response to political pressures exerted from campus or external sources, the challenged person may seeks refuge in free speech clauses of the federal constitution or within a comparable feature in a state law. While free speech provisions do grant privileges to the population-at-large, a closer examination of this legal standard is prudent when examining a clash of expression associated with a curricular function.

Courts blend a mix of scholastic and higher education standards in judging expression cases. The first major Supreme Court decision to address symbolic free speech overturned a high school ban on students wearing armbands. Contrary to administrative assertions, the acts of protest did not create a material or substantive disruption in the school.[45] Citing a precedent case nearly fifty years old, the majority opinion of the high court decreed that students and teachers were to retain their constitutional rights to free speech within the "schoolhouse gate."[46] The court in pronouncing the "Tinker Doctrine," created the most often cited decision regarding student and faculty rights. Although it has been significantly modified by subsequent rulings, it has endured to this date.

A survey of more recent cases defining a wide range of school-related topics, warring participants, and legal remedies illustrates the

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[45] Tinker v. Des Moines, 393 U.S. 503 (1969).
[46] Id. at 506, referring to Meyer v. Nebraska, 262 U.S. 390 (1923).

explosive and confusing complexities of what is protected speech and what is not shielded expression. One emerging trend is the expansiveness of federal and state courts in supporting educational policy makers and administrators in establishing and in carrying out their professional mission, especially if it is deemed to be within curricular goals. Once courts decide that schools are different places, the judicial standards for limiting expression is low.[47] With this new-found authority, scholastic boards of education have found ways to curb unwanted sexually suggestive speech at an assembly[48] and to delete objectionable articles from a school newspaper,[49] thus lessening the administrative restraints imposed by *Tinker*. For the most part, reasonable university policies not too dissimilar to those found in *Bethel* and *Hazelwood*, are supported in court if it can be shown that the challenged action is related to the mission of the institution, is not an issue of general public concern, and is designed to promote a safe and peaceful atmosphere for scholarship.

Although courts differ, separate federal appellate courts using *Bethel* and *Hazelwood* arrived at different conclusions. While one university in Alabama was able to place reasonable restrictions on a campus election,[50] another higher academy in Massachusetts was unsuccessful in applying the same rationale in regulating their

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47 Gill at 267.

48 Bethel v. Fraser 478 U.S. 675 (1986).

49 Hazelwood v. Kuhlmeier, 484 US 260 (1988).

50 For a direct application of Hazelwood to a higher education case, see Alabama Student Party v. Student Government Association, 867 F2d 1344 (11th Cir. 1989).

collegiate newspaper content.[51] It is important to note that the lesser federal courts are now examining university academic freedom issues in light of *Bethel* and *Hazelwood.*

The emergence of "hate speech" on campus and the well-intentioned directives to curb the potentially divisive behavior have surfaced in private and public universities. Sensing a widespread epidemic of disruptive racial and sexual slurs, officials at the University of Michigan initiated a policy to regulate verbal and sexual harassment. When challenged in court, the regulations--with the exception of the sexual harassment--were voided because of vagueness and overbreadth.[52] Two years later a federal court in nearby Wisconsin struck down a similar university anti-hate speech regulation.[53] The Supreme Court confirmed both appellate rulings by declaring a St. Paul, Minnesota, municipal code to be unconstitutional due to the vagueness of the wording.[54]

Returning once more to the University of Alabama and conflicts in expressing values, a tenured professor was unsuccessful in claiming academic freedom under free speech rights of the first amendment, unenumerated rights under the ninth amendments, and civil rights under (Section) 1983.[55] The Eleventh Circuit upheld an administrative memorandum forbidding the instructor to conduct an

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51 Student Government Association v. Board of Trustees of University of Massachusetts, 868 F2d 473 (1st Cir. 1989).
52 Doe v. Univ of Mich., 721 F.Supp. 852 (1989).
53 UWM Post v. Regents of Wisc., 774 F.Supp 1163 (1991).
54 R.A.V. v. St. Paul, 120 L.Ed 2d 305 (1992).
55 Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991).

optional physiology class ("Evidences of God in Human Physiology")[56] to express personally-held religious values in regularly scheduled physical education classes. The circuit quickly ruled that instruction in a classroom did not rise to the level of a public forum. Further, the challenged memorandum was judged to be a reasonable administrative attempt to carry out the instructional mission of the institution and was sufficiently narrow in scope to cast aside any claims of religious or expressive impingement.[57] Notwithstanding a *Tinker* affirmation that teachers and students have constitutional rights in school, the court disposed of the matter by affirming that the speech of teachers in an academy as being different from those of ordinary citizens in other settings.[58] The circuit decision was even more direct in dispatching the unenumerated rights claim by noting that the professor's argument pleaded in the barest language without attempting to skeletally state a Ninth Amendment case. The federal tribunal was confident that whatever rights the Ninth does shelter, the case in question was born and was placed to rest under the First Amendment.[59]

II. JUDICIAL RESOLVE IN HIGHER EDUCATION MATTERS

Historically, state and federal courts in the United States have sought to respect the academic mission of colleges and universities and to apply restraint in examining differences that surface among

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[56] Id. at 1069.
[57] Id. at 1071.
[58] Id. at 1072.
[59] Id. at 1078, n 9.

policy makers, administrators, instructors, and students. The judicial system supports the privileges and immunities of constitutional law and, at the same time, furthers the common law principle of not intruding into the quality of decisions that are made on campus. Courts are not, however, insensitive to appeals from educational participants. They provide objective standards academies to follow and, if necessary, examine conflicts to see whether an impermissible act occurred.

A. Academic Abstention

Although courts have demonstrated an increased willingness to intervene in college and university decisions, the reasons for the increased judicial surveillance may be due to heightened awareness of constitutional rights of professors and students, not because of a concerted effort to curb the institution's authority to operate academic programs. Even though courts have imposed limitations on administrative policies in select matters, most of the powers to govern institutes of higher learning have remained unchanged.[60]

When university faculty seek judicial support in matters related to scheduling courses, delivering lectures, receiving promotions, attaining desired assignments, posting student grades, altering programs, and the like, the university administration is the

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60 David M. Dumas, Caroline McIntyre, and Katheryne L. Zelenock, *Parate v. Isibor: Resolving the Conflict Between the Academic Freedom of the University and the Academic Freedom of University Professors*, 16 J. of Col. and Univ. Law 713, 722-3 (Spring 1990).

preponderant victor.[61] Courts defer to the exclusive expertise and special mission of the institution. Judicial deference to campus operations is furthered by extending the heritage of common law to support programs created within the campus statutes crafted by the administration.[62] The special needs of the university, as defined by these educational policy makers and administrators, afford institutional protection against most challenges concerning student governance, faculty qualifications, substantive rights issues, and disclosing information about sensitive academic matters.[63] Once officers of the court are satisfied that arbitrary, capricious, selfish, bad faith, or other impermissible motives are absent in the challenged administrative action, ***institutional*** academic freedom is strengthened by this judicial oversight and abstention.[64]

B. Forum Analysis

After determining that a public educator may be a state actor for purposes of analyzing whether unreasonable campus restrictions exist, the next important judicial factor to be established is the nature of the "forum" in which the challenged action occurred. The key element in determining the nature of a true public forum turns on whether the activity was created principally for open assemblage, discussion, and expression. A public forum can be regulated for time, place, and manner but cannot be controlled because of the subject

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61 Edwards and Nordin at 14-6.
62 Leas at 136-7.
63 Id. at 139.
64 Id. at 162-5.

presented by a participant. More restrictive types of public fora may be found on government property that is not specifically planned for public speech. In this instance, expression can be limited or curbed to achieve a governmental purpose. Restrictions in a non-public forum need only to be reasonably related to the mission of the sponsoring agency.[65]

Recently, the Supreme Court made it clear that the First Amendment did not prevent the administrators from determining that vulgar and lewd speech would undermine the basic education mission of the school.[66] Later, the Court permitted a principal to exercise editorial control over the style and content of student speech in a school newspaper.[67] Both landmark rulings reinforced the validity of reasonable governmental restrictions as applied to scholastic activities.

Although there has been a variety of subjects covering university conflicts, courts have consistently viewed the academic setting as a special concern of governing boards to maintain for learning. Courts now use the forum analysis of *Hazelwood* in higher education matters. The most notable example of this reasoning aided the University of Alabama in keeping a professor from expressing his personally held religious views in class.[68] Similar decisions, mostly

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[65] For an excellent and most comprehensive analysis of public forum law as it relates to education, see Gail Paulus Sorenson, *The 'Public Forum Doctrine' and its Application In School and College Cases*, 20 J. of Law & Ed. 445 (Fall 1991).
[66] Bethel at 685.
[67] Hazelwood at 262.
[68] Bishop at 1078.

favoring university administrators, concerned newspaper governance,[69] editorial control of student press,[70] gays and lesbians request for student government funds,[71] allocation of student fees,[72] commercial enterprises on campus,[73] an 'ugly woman" student contest,[74]student disciplinary hearings,[75] placement of a professor's art exhibit,[76] expectations of meet and confer understanding,[77] and construction of a "shanty town" on Thomas Jefferson's historic University of Virginia lawn.[78]

In late October, the chancellor at University of California in Berkeley issued a policy banning public nudity, indecent exposure, and sexually offensive conduct. Andrew Martinez, "the naked guy" and the apparent target of this new rule, was found on campus without a G-string and suspended from classes for two weeks.[79] Does anyone have a problem with this?

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[69] Alabama Student Party at 1347; Sinn v. Daily Nebraska, 638 F.supp. 143 (1986); CCC of Okla. v. Rogers, 689 F.Supp. 1065 (1988); Texas Review Society v. Cunningham, 696 F.supp. 1239 (1987); all four decisions favored institutions of higher education(IHE).

[70] Student Government Association v. Board of Trustees of University of Massachusetts, 868 F2d 473 (1st Cir. 1989), favoring student.

[71] Gay and Lesbian Student Assoc. v. Gohn, 850 F.2d 361 (8th Cir. 1988), favoring students.

[72] Carrol v. Blinken, 957 F.2d 991 (2nd Cir, 1992), favoring IHE.

[73] Glover v. Cole, 762 F.2d 1197, 1203 (4th Cir. 1985), favoring IHE; Fox v. Trustees of SUNY, 695 F.supp. 1409 (1988)), favoring student.

[74] Iota Xi of Sigma Chi v. George Mason Univ., 773 F.supp 792 (1991), favoring student.

[75] Rosenfeld v. Ketter, 820 F.2d 38 (2.d 1987), favoring IHE.

[76] Piarowski at 635, favoring IHE.

[77] Minnesota v. Knight, 104 S.Ct. 1058 (1984), favoring IHE.

[78] Students Against Apartheid v. O'Neil, 838 F.2d 735 (4th Cir. 1988), favoring IHE.

[79] Michalene Busico, *He's got nothing to hide...and he's also got nothing on his hide*, JUNEAU EMPIRE, November 14, 1992, at C8.

III. SPECTRES THREATENING ACADEMIC FREEDOM

Academic freedom as a single entity is not in jeopardy. Courts judging the merits of conflicts involving college and university issues continue to apply common law and constitutional principles to solve the impasse. The major threat to academic freedom is a result from the lack of unity among the major actors, the policy makers, administrators, professors, and students as learning institutions grow somewhat erratically in a world reeling with social, economic, and political change. In an attempt to support the learning atmosphere of higher education, courts have adopted more expansive support of the institution's mission as stated by campus officials. Contrary to the platitudes of academic freedom and collegial attempts designed to seek agreement through shared decision-making, professors and students continually loose protests. Archaic principles of collegial cooperation have been replaced by ineffective collective bargaining arrangements. Recent litigation limiting campus expression for professors and students add threateningly to campus issues pressing for resolution.

A. Progeny of the 1940 AAUP Principles

Since 1915, the AAUP has been the front running cooperative organization to determine the features essential to craft the most effective learning climate in our nation's colleges and universities.

The association published a statement of principles[80] to insure that the desirable features of academic freedom and faculty tenure were incorporated into faculty handbooks and college statutes. The AAUP principles created very "soft laws"[81] for many institutions. Some of this soft law of academic freedom was absorbed into judicial concepts of common law. Sensing the need for greater campus stability and noting the relatively few cases accepted by our courts of significant jurisdiction, it may now be problematic that only a small portion of the soft concepts has found acceptance in hard constitutional law.

Early AAUP professional initiative satisfied institutional needs through mid-century until the strained expansion of higher academies brought about dramatic increases in post-WWII enrollment. Managing burgeoning university school and college units required a full-time dean, no longer an academic with strong kinship with instructional and research peers, but a modern manager skilled in supervising complex groups as situations changed. The new age dean was characterized by personal competencies in communications, proficiencies in data storage and retrieval, and an ability to manage operating and capital budgets of considerable size. A significant difference in the professional personality makeup of deans and professors was noted. According to a recent study employing the Myers-Brigg Type Indicator and Leadership inventory,[82] deans

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80 Edwards and Nordin at 222-6, citing *1940 Statement of Principles on Academic Freedom and Tenure*, 27 AAUP Bul. 43 (1941).

81 Van Alstyne at 79.

82 Mary H. McCauley, *The Myers-Briggs Type Indicator and Leadership* in Kenneth E. Clark and Miriam B. Clark (editors), MEASURES OF LEADERSHIP (Leadership Library of America 1990).

tended to be "E-N-T-J" while pure academicians were "I-N-T-J." The professors mirrored their supervisor with the single exception of their pronounced introversion. To some, the professors' personal orientation to function alone and favor internal values over group interaction, may not serve the instructor-employees in negotiating conditions of employment with more freewheeling administrators. This may be especially hurtful when faculty assignments, annual salaries and periodic bonus awards, promotion, and tenure are decided by the administration in a subjective manner or in a university without collective bargaining agreements or campus statutes.

Few universities have created definitive academic freedom statements capable of structuring realistic personnel relations to lessen adversarial tensions.[83] The AAUP has maintained a professional association profile and a reluctance to adopt blue-collar trade union tactics or affiliate with one of the large nationwide unions like the AFL-CIO or the Teamsters for improved salaries and other employment benefits. According to Lieberman,[84] evidence is lacking to suggest that public educators are compromised by their membership in a large bargaining unit with trade union tactics. Higher education collective bargaining agreements lack a high degree of specificity in about eighty percent of college and university

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[83] "The University of Alaska is dedicated to providing an environment of free and honest inquiry essential to its functioning as a university." (Policy 04.08.0).]

[84] Myron Lieberman, in a personal interview (November 6-7, 1992), commented on this topic and referred to his text, THE FUTURE OF PUBLIC EDUCATION (University of Chicago Press 1960).

collective bargaining agreements, and only a minority of institutions have formal bargaining arrangements.[85] The typical collective bargaining agreements referring to academic freedom and responsibility do not afford clarity in coping with specific elements of university labor-management issues.[86] Faculty senates must press for the adoption of procedures to be included in department regulations and personnel manuals to counter procedures favoring administrators that may invite intimidation by deans and department heads over those professors who seek redress from professionally harmful acts. Neither common law academic freedom nor the First Amendment provides material protection for professor and student expression that does not rise to the level of public concern.[87]

B. A Bethel-Hazelwood-Bishop Triology

Both *Bethel* and *Hazelwood* cautioned that the rights of high school students were not coextensive with rights of adults and that

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[85] Perry A. Zirkel, *Another Lesson in Academic Freedom*, PHI DELTA KAPPAN 478, 80, n. 5 (February 1991).

[86] "The University and the Union agree that academic freedom is essential to the mission of the University and that providing the environment of free and honest inquiry is essential to its functioning. Nothing contained in this Agreement shall be construed to limit or abridge any person's right to free speech or to infringe upon the academic freedom of any member of the University community. Academic freedom is accompanied by the corresponding responsibility to provide objective and skillful exposition of one's subject, to at all times be accurate, to exercise appropriate restraint, to show respect for the opinions of others and to indicate when appropriate that one is not an institutional representative." (Art. 3.1 CB agreement between University of Alaska and Alaska Community Colleges' Federation of Teacher Local 2402, May 8, 1992 to June 30, 1994).

[87] Albert C. Jurenas and Chunsheng Zhang, *Biting The Hands That Feed Them: Can Faculty in Public Colleges and Universities Criticize Their Employers--And Survive?* 63 Ed.Law Rep. 429, 440 (December 20, 1990).

administrative curbs on expression were allowed if they were reasonably related to legitimate pedagogical concerns.[88] The doctrine of academic abstention is furthered in the pronouncement that education is the responsibility of school officials, not of federal judges"[89] Commentators have expressed concern about the potential for administrative abuse in the public schools and fear that the two decisions will be used as precedent for censoring library holdings or extending the first amendment exceptions to the public college and university press or to adults."[90]

Some cases using the *Hazelwood* forum analysis went far beyond the public high school. The Eleventh Circuit extended the scholastic case to the college level. This appeals court found that the student government association elections did not involve public fora, therefore, "the university should be entitled to place reasonable restrictions on this learning experience"[91] The most significant Eleventh Circuit ruling upheld the University of Alabama in curbing Philip A. Bishop's personal religious beliefs in class, although they were admittedly "biased." Bishop's supervisor and department head issued a memorandum affirming the university's commitment to the professor's right to academic freedom and freedom of religion, and careful not to create an encroachment into the constitutionally-

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[88] Hazelwood at 255, 273.

[89] Id. at 273.

[90] Gill at 258 and n. 31, and Katharine Ann Weber, *Hazelwood School District v. Kuhlmeier: Increased Regulation of the University Press?* 40 Alabama L. Rev. 267, 281 (1988).

[91] Alabama Student Party v. Student Gov't Ass'n, 867 F.2d 1344, 1347 (11th Cir. 1989), and Gill at 267 and n. 94.

protected area of expression, admonished Bishop for engaging in unwarranted sectarian behavior in a public institution. The injection of religious values in class comments and the conducting of an optional class entitled "Evidences of God in Human Physiology" were to cease.[92]

The circuit decision ruled that the complaint did not present a forum issue, overruling the district court assertion that a classroom is an open forum during instructional times. The memorandum regulating Dr. Bishop's teaching activities and expression of religious beliefs did not infringe on free speech or free exercise rights. The court reasoned that the memorandum, itself not overbroad or vague, was sufficiently narrow and clear to outline what a teacher could and could not do and did not reach the level of protected speech. The university asked that the professor separate his personal convictions from his professional teachings, even in the optional class.[93] Although the religious clauses were implicated, the merits of the case turned on the issue of free speech of public school teachers.

Citing the *Tinker* affirmation about teachers or students shedding their constitutional rights to free speech at the schoolhouse gate, the Supreme Court recognized the importance of employer needs in limiting the speech of employees, since their workplace expressions were different from those of ordinary citizens.[94] This distinction was especially true since the court recognized the difference between

[92] Id. at 1069.
[93] Id. at 1071.
[94] Id. at 1072.

speech a school must tolerate and speech a school must affirmatively promote. In *Hazelwood*, the school could determine what was appropriate in a school-sponsored newspaper when that newspaper was legitimately part of the school's curriculum. The University of Alabama was also entitled to place reasonable restrictions on curricular matters.[95] The Eleventh Circuit adopted the judicial abstention and forum analysis advanced in scholastic cases as being suitable in supporting curricular control at the university level.[96] Further, the court stated that universities must have the final say in a dispute over course content [97]

The Bishop appellate ruling concluded that academic freedom was not an independent First Amendment right and that federal judges were not in a position to supplant their discretion for that of university deans. Closing with a touch of irony, the court urged university officials to serve its own interest as well as those of its professors in pursuit of academic freedom since administrators should be aware that quality faculty members would be hard to attract and retain if they were to be shackled in much of what they did.[98]

Bethel and *Hazelwood* may have cast an ominous shadow on university professors and students. Now that the U.S. Supreme Court refused to consider an appeal to overturn the Eleventh Circuit's

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[95] Id. at 1073.
[96] Id. at 1074-5.
[97] Id. at 1076.
[98] Id. at 1075.

ruling in *Bishop*,[99] protected speech and expression on the university campus may exclude regular or optional classroom instruction or any other academic activity perceived to fall within the curricular mission of the institution. The addition of *Bishop* to its grade school counterparts may have created a trilogy that redefines academic freedom in the nation's public classrooms.

IV. EPILOGUE

In reviewing the concept of academic freedom in our colleges and universities, court decisions are weighted in favor of the institution's academic freedom. Most of the educational decisions have been unfavorable to petitioning professors and students. Courts refrain from overseeing university operations by applying judicial abstention and forum analysis to champion the university's rational and bias-free decisions within its mission. While the correlation among the two scholastic cases of *Bethel* and *Hazelwood* and the lone university lawsuit of *Bishop* may not be perfect, the structure of their results is strikingly similar. An important central tendency in these rulings is the misconception on the part of faculty members and students about the perceived shelters of common law academic freedom and First Amendment rights.

One researcher warned faculty members not to "drink too deeply of the bottle labelled academic freedom."[100] After such sobering

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[99] Bishop v. Delchamp, cert. den., 60 USLW 3878 (June 16, 1992).
[100] Zirkel, *Academic Freedom of Individual Faculty Members* at 824.

advise, those representing university professor interests should weigh the merits of seeking meaningful ways to create collegially acceptable, balanced, and workable campus statutes addressing academic freedom. The faculty should work to establish clear guidelines to cover teaching, research, and behavior. A mutually-acceptable document for campus governance could be attained within the spirit of collegial relations or through the machinery of an effective collective bargaining contract. Once the specifics of an agreement among administrators, professors, and students have been reached, periodic efforts to disseminate the information should be maintained. If this action produces little academic peace, faculties should consider labor agreements with a very large and very aggressive "blue-collar" national trade union to attain more definitive campus rules to protect academic freedom.

***Dr. Oldaker is a professor of education and head of the graduate programs in educational leadership and policy studies at the University of Alaska Southeast (Juneau).**

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